IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 27TH SEPTEMBER 2007 / 5TH ASWINA 1929

WA.No. 2256 of 2007

AGAINST THE JUDGEMENT IN WP(C) NO.17459/2007 Dated 03/08/2007

APPELLANT/ PETITIONER:

P.K.AMARJITH,
S/O.P.K.MANOHARAN,
RAJESWARI BHAVAN,
KANNUR-1.

BY ADV. SRI.R.BINDU (SASTHAMANGALAM)
& SRI.PRASANTH M.P

RESPONDENTS/RESPONDENTS:
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1. SMT.P.K.KAMALA,
W/O.LATE P.V.BALAKRISHNAN NAIR,
PARTNER, KAMALA INTERNATIONAL TOURIST HOTEL,
RESIDING NEAR TAJMAHAL HOUSE,
CHIRAKKAL AMSOM DESOM.

2. P.K.MANOHARAN,
S/O.LATE P.V.BALAKRISHNAN NAIR,
RESIDING AT RAJESWARI BHAVAN,
POOTHAPARA, AZHIKODE AMSOM DESOM.

3. SMT.P.K.KRISHNAKUMARI,
D/O.LATE P.V.BALAKRISHNAN NAIR,
PARTNER, KAMALA INTERNATIONAL TOURIST HOTEL,
12/A, CONTONMENT,
NEAR GOVERNMENT GUEST HOUSE, KANNUR.

4. SMT.P.K.SREELATHA,
D/O.P.V.BALAKRILSHNAN NAIR
RESIDING AT RAJ BHAVAN,
12 CONTONMENT,
THROUGH POWER OF ATTORNEY HOLDER,
P.K.KRISHNAKUMARI.

BY ADV. SRI.S.VINOD BHAT
& SRI.D.ANILKUMAR

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 27/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

H.L. DATTU, C.J. & K.T. SANKARAN, J.

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W.A. No. 2256 OF 2007

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Dated this the 27th September , 2007

J U D G M E N T

H.L. Dattu, C.J.:

Challenging the correctness or otherwise of the orders passed by the learned single Judge in W.P.(C) No. 17459 of 2007 dated 3rd August, 2007, the petitioner in the Writ Petition has filed this appeal.

2. The subject matter before the learned single Judge was the orders passed by the Sole Arbitrator dated 21st May 2007 and the consequential orders passed by the Arbitrator on the same day.

3. Arbitration proceedings were initiated by one P.K. Kamala against P.K. Manoharan, P.K. Krishnakumar and P.K. Sreelatha (through power of attorney holder, P.A. Krishnakumar). Before the Arbitrator, a request has also been made by the first respondent herein as well as in the Writ Petition that P.K. Amarjith is also a necessary party to the arbitration proceedings. The request of the first respondent had been granted by the Arbitrator and thereby had impleaded P.K. Amarjith as also a party to the arbitration proceedings. After the service of notice, Amarjith had appeared before the Arbitrator and had taken up a contention that he is not a necessary and proper party for the effective disposal of the arbitration proceedings. The Arbitrator, by his order dated 21st May 2007 has observed that the issue/preliminary issue need not be considered at that stage itself, since it requires evidence to be recorded. By that process, the Arbitrator has not stated as to whether Amarjit is a necessary party or not for the arbitration proceedings. In the words of the

Arbitrator :

> *"With regard to the impleadment of Sri Amarjith as a party in the arbitration , it is also an issue to be decided in the arbitration case and it cannot be decided as a preliminary issue. The learned counsel appearing for Sri Amarjith also submitted that he was unnecessarily impleaded in the arbitration proceedings. But in view of the issues raised in the arbitration proceedings with regard to the issue regarding his impleadment, it can be decided only after taking evidence in the matter. "*

3. After passing the aforesaid order, the Arbitrator has granted permission to all the respondents to file their statement of defence and documents , if any, in support of their case.

4. Questioning the aforesaid two orders passed by the Arbitrator, Amarjith/appellant herein, who was impleaded as a party to the arbitration proceedings, was before this court in W.P.(C) No.17459 of 2007. The learned single Judge by order dated 3rd August, 2007 while allowing the Writ Petition has observed as under:

> *"As such, I am not satisfied that the petitioner cannot be impleaded in the proceedings against his own wish. But if ultimately it is found that the award passed in the arbitration proceedings would affect the petitioner also, he cannot take a contention that because he was not party to the arbitration proceedings, the same would not be binding on him. With the above observation this Writ Petition is allowed and Ext.P2, to the extent it impleads the petitioner as a party to the arbitration proceedings is set aside. "*

5. Aggrieved by the aforesaid order passed by the learned single Judge, Amarjith/appellant herein is before us in this appeal.

6. When the matter had been posted before this court for admission, we had raised a query to the learned counsel appearing for the appellant/petitioner about the maintainability of the Writ Petition itself before the learned single Judge. After doing some research work, the learned counsel appearing for the appellant has adopted a stand that a Writ Petition is maintainable against an interlocutory order passed by an Arbitrator . In support of his stand, the learned counsel appearing for the appellant/petitioner has brought to our notice the observation made by the Apex Court in ***Rohtas Industries Ltd. vs. Rohtas Industries Staff Union (AIR 1976 SC 425) .*** In the aforesaid decision, the Apex Court has stated, at paragraphs 9, 10 and 11, as under:

> *"9. (1) (a) & (b):*
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> *The expansive and extraordinary power of the High Court under Article 226 is as wide as the amplitude of the language used indicates and so can affect any person-even a private individual – and be available for any (other) purpose, even one for which another remedy may exist. The amendment to Art. 226 in 1963 inserting Art. 226 (1-A) reiterates the targets of the writ power as inclusive of any person by the expressive reference to 'the residence of such person'. But it is one thing to affirm the jurisdiction, another to authorise its free exercise like a bull in a china shop. This Court has spelt out wise and clear restraints on the use of this extraordinary remedy and High Courts will not go beyond those wholesome inhibitions except where the monstrosity of the situation or other exceptional*

circumstances cry for timely judicial interdict or mandate. The mentor of law is justice and a potent drug should be judiciously administered. Speaking in critical retrospect and portentous prospect the writ power has, by and large been the people's sentinel on the qui vive and to cut back on or liquidate that power may cast a peril to human rights. We hold that the award here is not beyond the legal reach of Article 226, although this power must be kept in severely judicious leash.

10. Many rulings of the High Court, pro and con, were cited before us to show that an award under Section 10A of the Act is insulated from interference under Art. 226 but we respectfully agree with the observations of Gajendragadkar J., (as he then was) in Engineering Mazdoor Sabha [(1963) Supp. 1 SCR 625 = (AIR 1963 SC 874) which nail the argument against the existence of jurisdiction . The learned Judge clarified (at p. 640 of SCR) = (at. P. 881 of AIR):

"Article 226 under which a writ of certiorari can be issued in an appropriate case, is, in a sense, wider than Art. 136, because the power conferred on the High Courts to issue certain writs is not conditioned or limited by the requirement that the said writs can be issued only against the orders of Courts or Tribunals. Under Art. 226(1), an appropriate writ can be issued to any person or authority, including in appropriate cases any Government, within the territories prescribed. Therefore even if the arbitrator appointed under Section 10A is not a Tribunal under Art. 136 in a proper case, a writ may lie against his award under Article 226."

11. We agree that the position of an arbitrator under Section 10A of the Act (as it then stood) vis a vis Art.227 might have been different. Today, however, such an arbitrator has power to bind even those who are not parties to the reference or

agreement and the whole exercise under Section 10A as well as the source of the force of the award on publication derives from the statute. It is legitimate to regard such an arbitrator now as part of the methodology of the sovereign's dispensation of justice thus falling within the rainbow of statutory tribunals amenable to judicial review. This observation made en passant by us is induced by the discussion at the bar and turns on the amendments to Section 10A and cognate provisions like Section 23, by Act XXXVI of 1964."

7. In the pertinent observation made by the Apex Court at paragraphs 9 as well as 10 of the order, the Apex Court, while holding that this Court can exercise its extraordinary jurisdiction under some exceptional circumstances, has stated that if the order passed by the Arbitrator is either wholly arbitrary or illegal or in some exceptional circumstances, a Writ Court can entertain a petition filed under Article 226 of the Constitution of India against an award passed by the Arbitrator. The Apex Court, at paragraph 11 of the aforesaid decision, has further observed that an Arbitrator has power to bind even those who are not parties to the reference or agreement and the whole exercise under Section 10A of the Arbitration and Conciliation Act as well as the source of the force of the award on publication derives from the statute and such an award can be questioned in an arbitration proceedings including the proceedings under Article 226 of the Constitution of India. The Apex Court, in the case of **SBP & CO vs. Patel Engineering Ltd. [(2005) 8 SCC 618]**, at paragraphs 45 and 46 of the order has stated as under:

"45. It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during

arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in-between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties . But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.

46. The object of minimising judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage."

8. The sum and substance of the aforesaid pronouncement is that an award can be questioned by way of a petition filed under Articles 226 or 227 of the Constitution of India, after the award is passed by an Arbitrator in exercise of his powers under Section 10A of the Arbitration and Conciliation Act. The Apex Court also has observed in the said decision that it may not be permissible for the High Courts to entertain a petition filed under Article 226 of the Constitution of India against an interlocutory order passed by an Arbitrator.

9. In the present case, Amarjith/the appellant herein had questioned the orders passed by the Arbitrator dated 21st May 2007. In the said order, the Arbitrator has only stated that the preliminary issue, with regard to his impleadment in the arbitration proceedings, will be decided only after recording the evidence . The Arbitrator, as such, has not finally decided in the order as to whether Amarjith/the appellant herein, is a necessary/ proper party or not in the arbitration proceedings. But the learned single Judge, while allowing the Writ Petition filed by the appellant herein has gone to the extent of saying that Amarjith is not a proper party to the arbitration proceedings, however, if an award is passed and certain directions are issued to Amarjith/the appellant herein, that will be binding on him.

10. As we have already stated, the orders that was passed by the Arbitrator is by way of an interlocutory order. That order could not have been interfered with by the learned single Judge. Even otherwise also, in our

opinion, the Arbitrator, as such, has not decided the issue that was canvassed by the petitioner/appellant herein, but has only observed in his order that the petitioner's request to consider whether he is a necessary party or not cannot be done as a preliminary issue and that can be done only after recording the evidence of the parties . In our opinion, in view of the aforesaid discussion, we cannot sustain the orders passed by the learned single Judge on two counts. Firstly, the learned single Judge was not justified in interfering with an interlocutory order passed by the Arbitrator and secondly, since the orders passed by the Arbitrator does not affect the petitioner in any manner whatsoever , the Writ Petition should have been rejected even on that count itself.

11. In view of the above, the Writ Appeal requires to be rejected and it is rejected. However, liberty is reserved to the petitioner/appellant herein to question the final order that may be passed by the Arbitrator before appropriate forum, if for any reason, the final orders that may be passed by the Arbitrator goes against the petitioner/appellant herein.

Ordered accordingly.

H.L. DATTU,
CHIEF JUSTICE.

K.T. SANKARAN,
JUDGE.

lk/DK.